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Request hearing on Apr. 27, 2004  
(Arrn. already set Apr. 27, 2004)  
Department 53, 8:30  
Est. time 30 min.

Def. in custody.

**FILED**

**APR 26 2004**

**FRESNO COUNTY SUPERIOR COURT**

By  **DEPUTY**

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF FRESNO  
CENTRAL DIVISION

The People of the State of California,

Plaintiff,

vs.

Marcus Wesson,

Defendant

Case No.: F049017856

**Defendant Wesson's**

**Motion to Compel Discovery on**

**His Second Discovery Request**

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<sup>1</sup> Other members of Wesson's defense team include Ralph Torres and Michael O. Castro.

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## I. Introduction.

To: The Hon. Judge of this Court, and to the Fresno County District Attorney.

This motion is brought by authority of Penal Code section 1054.5, subdivision (b). Defendant, Marcus Wesson, requests this court to hear this forthwith.

Wesson's second discovery request was for the eleven items listed on pages 10 to 14 of "Defendant Wesson's Motion for Expedited Pre-Prelim Discovery," filed on April 6, 2003.

Wesson's first request for discovery was less particularized, but more comprehensive. At arraignment on the complaint, March 25, 2004, Wesson made, in open court and on the record, a blanket request for informal discovery. The court ordered reciprocal discovery. Arraignment Transcript, March 25, 2004, page 10, lines 13 to 16.



1 comprehensive discovery request more than a month ago, and made his second, less-  
2 comprehensive request 22 days ago.

3  
4 Wesson makes this request now, at arraignment, for three reasons.

5 First, Wesson cannot fully prepare for trial until the prosecution provides more  
6 discovery, particularly the discovery that is the subject of this motion to compel. He  
7 wishes to expedite his trial by expediting his receipt of the required discovery.

8 Second, Wesson needs the Discovery he was requesting before the preliminary  
9 examination to determine if the lack of that discovery deprived him of a substantial right,  
10 such as the right to cross-examination.<sup>2</sup> He desires to quickly resolve this matter, one  
11 way or the other, rather than to prolong it.

12 Third, Wesson needs the search warrant discovery to determine if he should make  
13 a motion to suppress the evidence involved, as having been unlawfully seized. Again,  
14 Wesson wishes to quickly resolve this matter, rather than to prolong it.

15  
16 The prosecution, on April 12, 2004, claimed that its failure to provide discovery is  
17 because "All discovery that is currently available has been provided to the defense. It's  
18 all the discovery I've got."<sup>3</sup>

---

19  
20  
21 <sup>2</sup> See, e.g., *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265 (failure to provide  
22 favorable evidence before preliminary examination may deprive the defendant of a  
substantial right.)

23 <sup>3</sup> The prosecution also claimed that it did not have to provide discovery because the  
24 defendant had not, at that time, brought a motion to compel. Preliminary Examination  
25 Transcript page 346, lines 12 to 14. But no motion to compel is required for the  
26 prosecution to be bound by the disclosure requirements of Penal Code section 1054.1.  
If a motion to compel were required, that would defeat the informal purposes of The  
Discovery Chapter, because then nobody would make any disclosures until the adverse  
party brought a formal motion to compel. *People v. Jackson* (19093) 15 Cal.App.4th  
1197, 1201 – 1203. This also underscores that motions to compel under Penal Code

1 That reason must fail. It will be perfectly obvious, when Wesson's discovery  
2 requests are analyzed below, that the most, or all, of the requested material is in the  
3 possession of the Fresno Police Department, the Fresno County Coroner, or the other  
4 investigating agencies.

5 Material that is in the possession of the investigating agencies is constructively in  
6 the possession of the prosecution. If they have it, the prosecution has it. To rule  
7 otherwise would be to let the pace of discovery be determined not by the prosecution, as  
8 the statute requires, but at the pleasure of the subordinate agencies. The California  
9 Supreme Court does not tolerate that. *In re Brown* (1998) 17 Cal.4th 873, 880 – 881.

10  
11 Wesson is requesting the court to order immediate disclosure of the following  
12 items, which he requested in his "Motion for Expedited Pre-Prelim Discovery."

13  
14 1. "The gunshot residue test results of Mr. Wesson himself, of the  
15 deceased persons, and of anybody else who was tested." This was item 1 in Wesson's  
16 "Motion for Expedited ... Discovery."

17 Wesson has now received discovery that before March 19, 2004, material was  
18 taken from Wesson himself, and from the bodies of Sebhrena Wesson and a second  
19 deceased person, possibly Elizabeth Breani Kina Wesson, for the purpose of testing for  
20 gunshot residue. (He does not know if material was taken from anybody else.) The  
21 results of these tests make a great deal of difference to both sides, since they would have  
22 a strong tendency to show who fired the nine fatal shots in this case. Surely those tests  
23  
24  
25

26 section 1054.5 are quite appropriate where, as here, the defendant has a compelling  
need to obtain required discovery sooner than 30 days before trial.



1 have been completed by now.<sup>4</sup> If they have not been completed, the prosecution should  
2 certainly explain why such critical evidence is languishing.

3  
4 2 and 3. Statements by Wesson and by witnesses at the scene. These were  
5 the 2nd and 3rd items requested in Wesson's "Motion for Expedited ... Discovery."

6 Wesson has now received discovery of some statements by Wesson and by  
7 witnesses. But Wesson is informed and believes that it does not include all statements  
8 made by him, nor does he believe it contains all statements by the witnesses at the scene.

9  
10 4. The autopsy and coroner's reports. This was item 4 requested in Wesson's  
11 "Motion for Expedited ... Discovery."

12 Wesson has now received some reports by peace officers who were present at the  
13 autopsies, they are not a substitute for the reports of the pathologist himself or herself.

14  
15 5. The results of any ballistics tests. This was item 5 requested in Wesson's  
16 "Motion for Expedited ... Discovery." Mr. Wesson has still not received any.

17  
18 6. The results of any fingerprint, and similar, tests done of the gun that was  
19 found. This was item 6 requested in Wesson's "Motion for Expedited ... Discovery."

20 Mr. Wesson has now received discovery that fingerprints were not lifted from the  
21 gun, but he has not received any discovery about any other tests on the gun.

22  
23 7. The dispatch tapes, radio logs, transcripts, and tapes from this incident.  
24 This was item 7 requested in Wesson's "Motion for Expedited ... Discovery."

25  
26 <sup>4</sup> By a subsequent letter to the prosecution, Wesson has also requested the bench notes,  
or lab notes, of those tests. But Wesson does not insist on those in this motion.

1 Mr. Wesson has now received discovery stating that numerous audio— and some  
2 video— tapes were made of Wesson's and of witnesses' statements, as well as dispatch  
3 and radio tapes, but he has not received any of them.

4  
5 8. The report from the Police Legal Advisor reporting the call from the scene.  
6 This was item 8 requested in Wesson's "Motion for Expedited ... Discovery." Mr.  
7 Wesson has not received this.

8  
9 9. The search warrant and affidavits in support. This was item 9 requested in  
10 Wesson's "Motion for Expedited ... Discovery."

11 Mr. Wesson has not received these. The court has, at the request of the Fresno  
12 Police Department, sealed some or all of this material, in separate cases W04912037-9,  
13 W04912038-7, W04912029-5, and W04912450-4.<sup>5</sup> The Fresno Bee has filed a motion  
14 protesting this, and a separate hearing has been set.

15 But even if the material remains sealed, still, it must be provided to Mr. Wesson.

16 First, the search warrant is discoverable under Penal Code section 1054.1. For  
17 example, surely, the warrants, and their supporting affidavits contain "[r]elevant written  
18 or recorded statements of witnesses or reports of the statements of witnesses whom the  
19 prosecutor intends to call at the trial ...." The prosecutor must, therefore, also disclose  
20 them to the defense, by command of Penal Code section 1054.1, subdivision (f).<sup>6</sup>

21 For another example, the affidavit supporting the search warrant, and some of the  
22 evidence seized may also contain "Statements of [the] defendant[ ]." The prosecution

23  
24 <sup>5</sup> The sealing orders have also been filed in this case, on March 30, 2004, and April 16,  
25 2004.

26 <sup>6</sup> Even if "only" the police, not the prosecution itself "has" the warrants in their  
immediate actual possession, still, the discussion above shows, they are in the  
constructive possession of the prosecution itself.



1 must therefore disclose those to the defense, this time by command of Penal Code section  
2 1054.1, subdivision (b).

3 As a third example of why the search warrant material is discoverable, the returns  
4 of the warrants probably contain "... relevant real evidence seized ... as a part of the  
5 investigation of the offenses charged...." Again, therefore, the prosecution must disclose  
6 that evidence to the defense, now by command of Penal Code section 1054.1, subd. (c).

7 If the prosecution fails to disclose all of this material to the defense, then the court  
8 must apply the remedies and sanctions of Penal Code section 1054.7. Surely the remedy  
9 would have to be exclusion of the evidence, both the real evidence and the prosecution's  
10 witness's statements. Indeed, a proper remedy could extend beyond mere exclusion.

11 In addition to his right to discovery under Penal Code section 1054.1, Wesson has  
12 a right, under Penal Code section 1538.5, to file a motion to suppress any illegally  
13 obtained evidence. Obviously, he cannot do that unless he obtains the warrants, their  
14 supporting affidavits, and all related material. And for Wesson to do this in an orderly  
15 manner, he must have this material well in advance of trial.

16 But if the prosecution claims an official privilege to refuse to provide this material,  
17 and the court sustains that, then Evidence Code section 1042, subdivision (a) will apply.

18 Evidence Code section 1042, subd. (a), provides as follows (boldface added).  
19

20 "Except where disclosure is forbidden by an act of the Congress of the  
21 United States, if a claim of privilege under this article ... is sustained in a  
22 criminal proceeding, **the presiding officer shall make such order or**  
23 **finding of fact adverse to the public entity bringing the proceeding as is**  
24 **required by law** upon any issue in the proceeding to which the privileged  
25 information is material."  
26

25 The Law Revision Comment to Evidence Code section 1042, points out that if  
26 relates to the legality of a search, the remedy can include striking witness-testimony.

1 That Comment also states that if the material goes to guilt or innocence, the remedy can  
2 also include dismissal of the case.

3 This is an application of the U.S. Supreme Court's teaching in *U.S. v. Reynolds*  
4 (1953) 345 U.S. 1, 12:

5 "... [S]ince the Government which prosecutes an accused also has a duty to  
6 see that justice is done, it is unconscionable to allow it to undertake  
7 prosecution and then invoke its governmental privileges to deprive the  
8 accused of anything which might be material to his defense."

9 Wesson recognizes that the prosecution may be permitted to "defer[ ]" disclosure  
10 if immediate disclosure would result in "possible compromise of other investigations by  
11 law enforcement." Penal Code section 1054.7, paragraph 1, emphasis added.

12 But Section 1054.7 does not provide the court any authority to defer disclosure if  
13 the only reason is that the investigation in this case is ongoing. But this investigation is  
14 the only reason given for sealing that is stated in the sealing-orders.<sup>7</sup>

15 But even if there is some "other" ongoing investigation, again, if the prosecutor is  
16 allowed to withhold the search warrant material from the defense, the remedies and  
17 sanctions of Penal Code section 1054.7 and Evidence Code section 1042 will apply, to,  
18 surely, exclude the material from this trial entirely.

19 Accordingly, even though the search warrant material is sealed, the court must  
20 compel the prosecution to provide him, immediately, all of that material.

21  
22 10. Photographs and diagrams of the scene. This was item 10 requested in  
23 Wesson's "Motion for Expedited ... Discovery."

24  
25  
26 <sup>7</sup> Each sealing order is nearly identical. See each order, page 1, lines 10 to 14.



1 Since then, Wesson has received several diagrams of the scene. He does not know  
2 if he has received them all. The discovery included reports that hundreds of photographs  
3 have been taken. Yet he has not received any of them at all.  
4

5 11. All evidence favorable to Mr. Wesson on the issue of guilt or punishment.  
6 This was item 11 requested in Wesson's "Motion for Expedited ... Discovery." The  
7 prosecution has not stated whether or not it has such evidence.  
8  
9

10 **Conclusion.**  
11

12 The court should set this motion for a formal hearing as soon as possible.

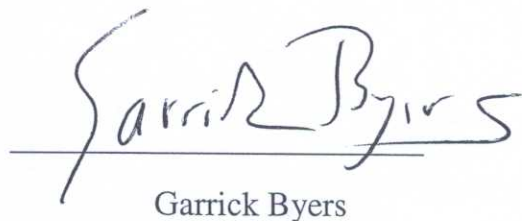
13 After the hearing, the defense will request the court to require the prosecutor to  
14 provide all of the discovery listed above, immediately.  
15

16 Respectfully Submitted,  
17

18 4/26/04

19 Date

20  
21   
22  
23 Peter M. Jones

24   
25  
26 Garrick Byers

AFFIDAVIT OF PROOF OF SERVICE  
(2009, 2015.5 C.C.P.)

State of California   )  
                                  )  
County of Fresno    )

Comes now the undersigned, who hereby declares as follows:

I am a citizen of the United States of America and am employed in the county aforesaid. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Public Defender's Office, County of Fresno, 2220 Tulare Street, Suite 300, Fresno, California 93721.

On the 26<sup>th</sup> day of April, 2004, I served a copy of the attached [TITLE OF MOTION] on an employee of the office of the District Attorney, for the County of Fresno, by delivering and depositing a true copy thereof with said employee.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 26, 2004.

*Tiffney S. Kuckenkaker*

RECEIPT OF A COPY OF THE FOREGOING  
DOCUMENT IS ACKNOWLEDGED.

DATE: \_\_\_\_\_

BY: \_\_\_\_\_

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